



Re: Fw: Rescheduled: Pavillion, WY and Dimock, PA Hydraulic Fracturing cases (Apr 19 11:00 AM EDT in Conference Room 6212/OECA-OSRE/OECA-OSRE@EPA)

Carrie Wehling to: Kimi Matsumoto

Cc: Pooja Parikh, Erin Perkins

03/30/2012 08:26 AM

From: Carrie Wehling/DC/USEPA/US

To: Kimi Matsumoto/R8/USEPA/US@EPA

Cc: Pooja Parikh/DC/USEPA/US@EPA, Erin Perkins/RC/R8/USEPA/US@EPA

Ex. 5 - Deliberative

Pooja --- are you planning to attend this meeting? Let me know if you have a schedule conflict and I will add it to my calendar. Thanks!

Carrie

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Kimi Matsumoto

Hi Carrie and Pooja - FYI, rescheduled meeting information below. Also, inte...

03/29/2012 08:02:40 PM

From: Kimi Matsumoto/R8/USEPA/US

To: Carrie Wehling/DC/USEPA/US@EPA, Pooja Parikh/DC/USEPA/US@EPA

Cc: Erin Perkins/RC/R8/USEPA/US@EPA

Date: 03/29/2012 08:02 PM

Subject: Fw: Rescheduled: Pavillion, WY and Dimock, PA Hydraulic Fracturing cases (Apr 19 11:00 AM EDT in Conference Room 6212/OECA-OSRE/OECA-OSRE@EPA)

Hi Carrie and Pooja -  
FYI, rescheduled meeting information below. Also, interesting article on documents in our record...

Justice was blind to some facts in Idaho wetlands case

Lawrence Hurley, E&E reporter

Published: Thursday, March 29, 2012

When the Supreme Court ruled unanimously against U.S. EPA last week in a Clean Water Act case, it was widely characterized as a victory for courageous underdogs against a bureaucratic behemoth.

The winners were Mike and Chantell Sackett, a likable couple from Priest Lake, Idaho, who just wanted to build a house on a plot of land near the scenic waterfront.

The loser was heavy-handed EPA, which -- as Justice Samuel Alito put in his concurring opinion -- "would have put the property rights of ordinary Americans entirely at the mercy" of Washington bureaucrats.

Now the Sacketts have a chance to contest in court EPA's contention that their 0.63-acre lot is a wetland, and the agency's authority to force compliance with the Clean Water Act with minimum fuss has been weakened (*Greenwire*, March 21).

But -- as several legal experts, including former EPA staff, and the Natural Resources Defense Council have pointed out -- there is more to the Sacketts' story than meets the eye.



Mike and Chantell Sackett at their property in Priest Lake, Idaho. Photo by Lawrence Hurley.

And, perhaps crucially, the nine justices did not have all those facts before them when deciding the case.

"What's most interesting about this case is not what is said but what is unsaid," said Robert Andersen, a former chief counsel of the Army Corps of Engineers.

As far as the justices were concerned, the Sacketts could not have been more sympathetic petitioners.

They did not know the site could be viewed as a wetland, they insisted. They continue to maintain it is not.

Regardless, EPA ruthlessly issued a heavy-handed administrative compliance order that could slap the Sacketts with up to \$75,000 per day in fines for as long as they failed to remove fill material they had dumped on the site in 2007.

Even worse, lawyers at the conservative Pacific Legal Foundation raged, the Sacketts could not contest EPA's determination in court, meaning fines could increase until the

agency decided to bring a formal enforcement action.

The Supreme Court bought into the Sacketts' story and ruled 9-0 in their favor.

In the majority opinion, Justice Antonin Scalia wrote that the Sacketts could have their day in court because the Clean Water Act does not, as the government claimed, preclude judicial review under the Administrative Procedure Act.

There is no reason, Scalia wrote, "to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance.'"

And that was that.

But some legal experts familiar with EPA say there is another side to the story, one in which the Sacketts aren't quite innocent victims of agency overreach. It is a tale that suggests there were plenty of opportunities for the dispute to be resolved without the need of Supreme Court intervention.

Legal experts say EPA's lawyers did not handle the case as well as they could have. That is why the case wasn't settled earlier and why some pertinent information that might have changed perceptions about the Sacketts was not in the official record upon which the Supreme Court is required to rely.

The Natural Resources Defense Council -- after obtaining some of that information via a Freedom of Information Act request -- alerted the court by filing a friend-of-the-court brief, but it faced an insurmountable hurdle, as referenced during January's oral argument.

Government attorney Malcom Stewart tried to bring up some of NRDC's findings but was sharply cut off by Chief Justice John Roberts.

"If they weren't in the record, I don't want to hear about them," Roberts said. "You appreciate that rule, that we don't consider things that aren't in the record?"

Stewart had little choice but to concede that point.

The NRDC documents do indeed show the Sacketts in a different light, although whether that would have influenced what the Supreme Court decided is impossible to say.

The documents indicate that the Sacketts knew early on that their property probably was a wetland. An expert they hired said so in May 2007, just after EPA first visited the property but months before the agency issued the compliance order.

Furthermore, on May 23, 2007, the Army Corps gave the Sacketts a permit application and asked them to complete it.

Chantell Sackett's own notes also suggest she recognized the land was a wetland, even if she contested EPA's authority to regulate it.

"There appears to be some tension between these facts and petitioners' claims," NRDC lawyers said in the brief.

### Framing the dispute

Experts on administrative law note that the additional facts would not have affected how the Supreme Court case came out. That is because the issue the court focused solely on was the question of whether EPA's issuance of a compliance order constituted a "final agency action" under the Administrative Procedure Act.

"I don't think it makes a difference," said Jonathan Adler, a professor at Case Western Reserve University School of Law. "The administrative law principle doesn't change."

Others note, however, that it could have affected the court's decision whether or not to take the case in the first place.

The court only takes up a small number of the petitions that are filed. Sometimes, court experts say, the way a case is framed can influence that decision, which requires the votes of four justices.

As Richard Frank, director of the California Environmental Law and Policy Center at the University of California, Davis, noted, if the government had been able to cite some of the information included in the NRDC brief, "the equities wouldn't have seemed so sharply contrasted, which in turn could have affected how the justices would have approached" deciding whether to take on the case.

NRDC attorney Larry Levine also said "there's a possibility" the court would not have taken the case. Even though the Army Corps documents were not part of the record, he said, they might still have influenced how the justices decided the case.

"The material that wasn't in the record told a different story," he said. "It's possible that presenting the rest of the story may have had an effect."

He doesn't fault the EPA attorneys' handling of the case, saying they treated it as they had many similar cases that were resolved before the issue in *Sackett* caught the attention of the high court.

There are other questions about how the case played out not addressed by the NRDC documents that continue to baffle former Army Corps attorney Andersen, now in private practice with Clark Hill.

He noted, for example, that the Sacketts could have simply asked the Army Corps for what is called a jurisdictional determination if they had any concerns about whether the property contained wetlands. Those determinations are immediately appealable, Andersen added.

"My supposition is they knew full well they could have asked the state or the feds" for a determination, he said. "And they would have got an answer."

### 'Dream home'

What remains uncertain is when, if at all, the Sacketts will be able to build what they have described as their "dream home."

They have won the chance to contest EPA's finding that their property sits on a wetland, but that does not mean they will prevail.

As part of the process, the judge will consider the record that EPA compiled at the time, which may or may not include some of the same documents that NRDC uncovered.

If the court rules against the Sacketts, they could still face an enforcement action and, at that point, what they knew before the compliance order was issued would become relevant, as their attorney, Damien Schiff conceded.

The Sacketts' level of awareness is "only relevant if we were talking about penalty liability under civil enforcement," Schiff said.

One likely outcome is that after a legal battle that has already lasted for five years, the Sacketts will end up applying for a permit after all.

Ultimately, Schiff said, if the land is found to be wetlands, "they will fully comply."

-----Forwarded by Kimi Matsumoto/R8/USEPA/US on 03/29/2012 05:58PM -----

Calendar Entry

**Meeting Change** Karin Leff has rescheduled this meeting

